-#-

.FO 1
Date of Decision: 20th/21st December 1995

CRIMINAL APPEAL NO. 415 OF 1988
with
CRIMINAL APPEAL NO. 416 OF 1988
with
CRIMINAL APPEAL NO. 716 OF 1988
with
CRIMINAL APPEAL NO. 717 OF 1988

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? No

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to ...

Civil Judge? No

Shri P.M. Thakkar, Advocate, with Smt. V.P. Thakkar, Advocate, for the Appellant in Criminal Appeal No. 415 of 1988 and for the Respondents in Criminal Appeals Nos. 716 and 717 of 1988

Shri K.J. Shethna, Advocate, for the Appellants in Criminal Appeal No. 416 of 1988

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent in Criminal Appeals Nos. 415 of 1988 and 416 of 1988 and for the Appellant in Criminal Appeals Nos. 716 and 717 of 1988

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ
(Date: 20th/21st December 1995)

ORAL JUDGMENT (per Divecha, J.)

All these appeals arise from the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Kheda at Nadiad on 13th April 1988 in Sessions Case No. 148 of 1987 convicting original accused No. 1 of the offences punishable under sec. 302 and under sec. 201 read with sec. 34 of the Indian Penal Code, 1860 (the IPC for brief) and under sec. 25(1)(a) of the Arms Act, 1959 (the Act for brief) and original accused No. 2 of the offences punishable under sec. 201 read with sec. 34 of the IPC and under sec. 29(b) of the Act and original accused No. 3 of the offences punishable under sections 217 and 218 of the IPC and sentencing original accused No. 1 to rigorous imprisonment for life for the offence punishable under sec. 302 of the IPC and rigorous imprisonment for 6 months and fine of Rs. 300 in default rigorous imprisonment for 15 days for the offence punishable under sec. 201 read with sec. 34 of the IPC and rigorous imprisonment for three months for the offence punishable under the Act, original accused No.2 to rigorous imprisonment for 6 months and fine of Rs. 300 in default rigorous imprisonment for 15 days for the offence punishable under under sec. 201 read with sec. 34 of the IPC and rigorous imprisonment for 3 months for the offence punishable under the Act, and original accused No.3 to rigorous imprisonment for one month for the offences punishable under sections 217 and 218 of the IPC. Original accused No. 3 has challenged his conviction and sentence by means of Criminal Appeal No. 415 of 1988 and original accused Nos. 1 and 2 have done so by means of Criminal Appeal No. 416 of 1988. The prosecution agency was not happy with the judgment and order of conviction passed by the lower court resulting in acquittal of accused No. 2 of the offence punishable under sec. 302 read with sec. 34 of the IPC. Similarly, the prosecution agency was unhappy over the lenient sentence imposed on original accused No.3 by the lower court. It has therefore preferred Criminal Appeals Nos. 716 and 717 of 1988 for questioning the correctness of the order of acquittal of accused No.2 qua the charge of the offence punishable under sec. 302 read with sec. 34 of the IPC and for enhancement of the sentence imposed on original accused No. 3. Since all the four appeals are directed against the very same judgment and order of conviction and sentence and since common questions of law and fact are found arising in all these four appeals, we have thought it fit

to dispose of all these four appeals by this common judgment of ours.

2. The facts giving rise to all these appeals move in a narrow compass. One person, named, Ramabhai Somabhai (the deceased for convenience), was working as a Watchman in the company by the name of Jyoti Switchgears Ltd. (the company for convenience) having its plant situated at village Mogar taluka Anand district Kheda. Accused No.1 was working as an Assistant Security Officer and accused No. 2 as the Security Officer in the company at the relevant time. The incident in question is stated to have occurred on 25th August 1981 at about 12.45 p.m. Accused No. 3 was working as a Senior Police Sub-Inspector at the relevant time attached to the Rural Police Station at Anand. It is the case of the prosecution that on that day, that is, on 25th August 1981, some cash was required to be withdrawn from the company's account in UCO bank at Anand. The cashier was deputed to Anand for the purpose and accused No.2 as the Security Officer accompanied him for the purpose. The amount to be withdrawn from the bank was in the sum of about Rs. 2,75,000. It is the prosecution case that both the cashier and accused No. 2 reached the bank at about 10.55 a.m. and they left the bank at about 12.20 p.m. after the cash was received from the bank cashier. They are stated to be back in the factory compound of the company at about 12.45 p.m. According to the prosecution version, both the cashier and accused No.2 travelled in a jeep driven by a driver. After the jeep entered the factory compound of the company, accused No.2 made the jeep stop near the Security Officer's office near the main gate. The deceased was standing thereat. Accused No. 2 had a loaded fire arm (the pistol for convenience) with a holster containing 17 live cartridges. He wanted his fire arm together with the holster to be placed in the cupboard in his office. He thereupon handed over its custody to the deceased for the purpose. Thereafter the jeep proceeded to the administrative office. The cashier got down and placed the cash withdrawn from the bank in safe custody. Thereafter accused No.2 appears to have set out for going back to his office. It may be mentioned at this stage that the company's factory is housed in a parcel of land having three gates. One abuts on National Highway No.8. It is always kept closed. The other is in the lane leading to village Rupale. That is the main gate. The other gate is about 1500 ft. away on the other side of the compound wall abutting certain fields. The prosecution version is to the effect that the deceased reported for work around 10.00 a.m. on 25th August 1981. At that time another watchman by the name of Hassan Ali Saiyed Ali Saiyed (Prosecution Witness No. 2 at Ex. 10) was posted at the main gate. It appears that the deceased was the main watchman and he was therefore posted at the main gate in the place of Prosecution Witness No. 2 and the latter was posted on Gate No. 2 about 1500 ft. away on the other side of

the compound wall as aforesaid. It appears that a short while from leaving the cashier in the administrative office of the company by accused No. 2, the deceased was reported to have received a bullet injury. The deceased was immediately carried to Municipal Hospital at Anand. He appears to have died thereat about an hour later at about 2.30 p.m. on that day. It appears that accused No.2 went to the Rural Police station at Anand to give information of the incident. It was taken down by the police official in charge of the Police Station (Prosecution Witness No. 11 at Ex. 35) in absence of accused No. 3. It was taken down in the Register of Miscellaneous Information, popularly known in the police parlance as 'Janva Jog Yadi'. It appears that thereupon Prosecution Witness No.11 went to the Municipal Police Hospital for investigation and he found thereat that the injured victim was unable to speak. Prosecution Witness No.11 thereupon appears to have come back to his police station and he appears to have handed over the investigation to accused No.3. According to the prosecution story, in the meantime, a message was received at the Rural Police Station at Anand about the death of the deceased at about 2.30 p.m. on that day. It was reported that it was a case of accident. The necessary noting was made in the accident case register. It appears that some four years later the wife of the deceased made one complaint suspecting the homicidal death of her deceased husband at the relevant time. It appears that the case was then taken up for re-investigation. On conclusion of such re-investigation, a charge-sheet came to be submitted to the Court of the Judicial Magistrate (First Class) at Anand charging accused Nos. 1 and 2 with the offences punishable under sec. 302 read with sec. 34 of the IPC and under sec. 201 read with sec. 34 thereof and under sec. 25(1)(a) of the Act qua accused No. 1 and sec. 25(1)(c) thereof qua accused No.2 and accused No.3 with the offences punishable under sections 217 and 218 of the IPC. Since the trial of the case was beyond the competence of the learned Judicial Magistrate at Anand, it was committed to the Sessions Court of Kheda at Nadiad for trial and disposal. It came to be registered as Sessions Case No. 148 of 1987. It appears to have been assigned to the learned Additional Sessions Judge of Kheda at Nadiad for trial and disposal. The charge against the accused was framed on 16th October 1987. No accused pleaded guilty to the charge. They were thereupon tried. After recording the prosecution evidence and recording the further statement of each accused under section 313 of the Criminal Procedure Code, 1973 and after hearing rival submissions, by his judgment and order of conviction and sentence passed on 13th April 1988 in Sessions Case No. 148 of 1987, the learned Additional Sessions Judge convicted and sentenced the accused as aforesaid. That aggrieved all the three accused and they have preferred their respective appeals for challenging their respective conviction and sentence. The State is also aggrieved by the judgment and order in question to the extent that it did

not result in conviction of accused No.2 of the offence punishable under sec. 302 of the IPC and to the extent of imposition of a lenient sentence on accused No. 3. It has also therefore preferred the respective appeals to the extent of its dissatisfaction with the judgment and order in question.

3. The entire case is based on circumstantial evidence. There is no eye witness to the incident. It is a settled principle of law that circumstantial evidence can be the sole basis of conviction if all incriminating circumstances in the chain of events are fully established. The learned trial Judge has found such incriminating circumstances to have been established at the trial. That finding is challenged by learned Advocate Shri Shethna appearing for accused Nos. 1 and 2 and learned Counsel Shri Thakkar for accused No. 3 but is supported by learned Additional Public Prosecutor Shri Divetia for the State. The learned lawyers appearing for the parties have taken us through the entire evidence on record. Muddamal articles Nos. 1 and 2 in the list at Ex. 1 in the record of the sessions case were also summoned at the instance of the learned Additional Public Prosecutor. Since they were no longer required to be retained in this Court after hearing of rival submissions, we have passed a separate order for their return to the custody from which they were summoned.

4. It cannot be gainsaid that in a case based on circumstantial evidence the motive behind the crime plays a very important and significant role. No ruling is needed in support of this principle of law. A reference may however be made to the one handed down by the Apex Court in the case of State (Delhi Administration) v. Gulzarilal Tandon reported in AIR 1979 SC 1382. As rightly submitted by learned Additional Public Prosecutor Shri Divetia, absence of proof of motive does not result in negation of the prosecution case altogether. He has rightly relied on the binding rulings of the Supreme Court in the case of The State of Madhya Pradesh v. Digvijay Singh reported in AIR 1981 SC 1740 and in the case of Rajinder Kumar and another v. State of Punjab reported in AIR 1966 SC 1322 For the purpose. The learned Additional Public Prosecutor has also relied on the Division Bench ruling of the Calcutta High Court in the case of Parimal Banerjee v. The State reported in 1986 Criminal Law Journal at page 220 in that regard.

5. The motive of the alleged crime in this case has not at all been established. Except a vague reference by the widow of the deceased in her communication nearly four years after the incident giving rise to the re-investigation, no witness examined by or on behalf of the prosecution has stated anything about the deceased in the context of his relations with other members of the staff, more particularly with accused Nos. 1 and 2. The letter from the widow of the deceased about 4 years

after the incident is at Ex. 34 on the record of the case. Its contents show that it was written about 4 years after the incident. It has been stated therein that the deceased was very honest and he used to detect theft in the company, and as such incurred displeasure of security officers involved in those theft cases. It may be noted that the widow has not been examined as a witness by or on behalf of the prosecution at trial. Prosecution Witness No. 7 at Ex. 17 was serving as a Plant Manager in the company at the relevant time. He had put in about 14 years' service on the date of the incident. He has stated in no uncertain terms in his cross-examination that during the period of his service he knew that no watchman was ever awarded any prize for detecting theft or doing good work. He has further deposed that no certificate was issued to any one for rendering good service or for detecting theft because it was not the company's system or policy. That apart, all witnesses working in the company examined by the prosecution at trial have unequivocally asserted that the deceased had no inimical relations with any one including the accused, more particularly, accused Nos. 1 and 2. In fact, the son of the deceased has been examined as Prosecution Witness No. 10 at Ex. 33. He has not stated anything about his father's honesty and integrity and uprightness in detection of theft cases or earning of laurels by his father for the purpose. He has also stated in no uncertain terms that his father had no enmity with any one in the company's factory. Taking into consideration the aforesaid evidence on record, the learned trial Judge has recorded a clear-cut finding to the effect that the prosecution has not been able to establish any motive behind the alleged crime. In view of the aforesaid overwhelming evidence on record, we are left with no alternative but to concur with the learned trial Judge on this score.

6. Learned Additional Public Prosecutor Shri Divetia is right in his submission to the effect that absence of the proof of motive behind the crime does not result in negation of the prosecution case altogether in view of the aforesaid binding rulings of the Supreme Court. It may however be necessary for the prosecution to bring on record the incriminating circumstances to lead to the one and only conclusion that the accused and none else is or are guilty of the alleged crime. It is needless to say that all the incriminating circumstances have to be brought on record beyond reasonable doubt. Keeping this well-known principle in mind, we should now revert to the incriminating circumstances stated to have been brought on record by and on behalf of the prosecution at trial.

7. The following circumstances are pressed into service by and on behalf of the prosecution for the purpose of fastening the criminal liability on the accused, more particularly accused Nos. 1 and 2 qua the offence punishable under sec. 302 read

with sec. 34 of the IPC.

(i) The deceased received a bullet injury from the pistol of accused No. 2.

(ii) The used cartridge of the bullet was found from near the scene of the incident.

(iii) The medical evidence clearly shows that it was a homicidal death and not a suicidal or accidental death.

(iv) The evidence and the report of the ballistic expert are eloquent enough not only to connect the bullet found in the body of the deceased with the muddamal pistol of accused No. 2 but also to suggest the case of homicidal death.

(v) The presence of both accused Nos. 1 and 2 at the scene of offence at the time of the incident.

(vi) There was no reason for accused No. 2 to give his pistol with the holster to the deceased when accused No.1 himself was present and accused No. 1 was the Assistant Security Officer working in the company at the relevant time.

(vii) The conduct of both accused Nos. 1 and 2 in misreporting to the police the incident as an accident.

(viii) The conduct of both accused Nos. 1 and 2, more particularly of accused No. 2, in removing the muddamal pistol from the scene of offence after occurrence of the incident.

(ix) The conduct of accused No.3 in screening the offenders by making perfunctory make-believe investigation into the incident.

8. As aforesaid, principles of criminal jurisprudence as to conviction on the sole basis of circumstantial evidence would prompt us to examine whether or not all the aforesaid circumstances are fully established at trial.

9. The one circumstance heavily relied on by and on behalf of the prosecution is removal of the weapon of offence from the scene of offence immediately after occurrence of the incident. It is an admitted position on record that the weapon of offence was recovered from its position by accused No. 2. It was lying in the cupboard in his office. As pointed out hereinabove, the office of accused No.2 as the Company's Security Officer was near the main-gate. Adjacent to it was the office of the gate-keeper or the gate-supervisor. The administrative office of the company was admittedly inside the factory compound at a distance of more than 1500 ft. by the tar road leading thereto.

Its plant was presumably still further inside. The scene of offence panchnama at Ex. 41 was drawn between 4.30 p.m. and 5.30 p.m. on the day of the incident itself. As aforesaid, the fire-arm was recovered from accused No. 2 under the panchnama at Ex. 43. That was drawn on 5th April 1987 between 1.15 p.m. and 2.50 p.m. It however transpires from the scene of offence panchnama at Ex. 41 that the fire-arm was found lying in the cupboard in the office of accused No. 2 as the Security Officer of the Company. It is not in dispute that a bullet from the very said fire-arm (pistol) wounded the deceased resulting in his death. Learned Additional Public Prosecutor Shri Divetia is right in his submission that ordinarily the fire-arm ought to have been allowed to remain where it was lying after occurrence of the incident; nobody ought to have even touched it, much less removed it therefrom. The very fact that it was found lying in the cupboard in the office of accused No.2 would go to show that it was removed from the place where it was lying after occurrence of the incident resulting in the death of the deceased.

10. The finding of the used bullet from the scene of offence is not disputed by or on behalf of the accused at any point of time. The panchnama at Ex. 41 bears ample testimony in that regard.

11. The evidence of the ballistic expert at Ex. 67 (Prosecution Witness No. 18) does unequivocally connect the used bullet with the pistol in question. He has clearly established the same through his deposition at Ex. 67 and through his report containing his written opinion at Ex. 29.

12. So far as the presence of accused Nos. 1 and 2 at the scene of offence at the relevant time is concerned, it is difficult to come to the conclusion that the prosecution has fully succeeded in proving it at trial. There is no exact time given by or on behalf of the prosecution as to at what time the incident in question occurred. The Rural Police Station at Anand has received its information at 1.45 p.m. through accused No. 2. That information was reduced to writing. It is at Ex. 36 on the record of the case. There the time of the incident is stated to be around 1 p.m. on that day. The prosecution has examined the cashier of the company at Ex. 9 on the record of the case. He had gone to the bank at Anand for withdrawal of cash in a jeep driver by a driver. He was accompanied by accused No. 2. The cashier at Ex. 9 has stated in no uncertain terms that they were back in the factory at about 12.45 p.m. on that day. According to him, accused No. 2 made the jeep to have a brief halt near his office for the purpose of handing over his pistol with the holster to the deceased for placing it in the cupboard inside the office. One cannot overlook the fact that sometime was consumed when the jeep

proceeded to the administrative office of the company, the cashier got down therefrom, he put his cash in his hand in the safe custody, and thereafter accused No. 2 set out for his return journey to his office. The cashier at Ex. 9 has clearly deposed that his office is on the first floor. The distance between the office of accused No.2 near the main gate and the administrative office in the factory compound would be about 1500 ft., if not more. It would roughly be half a kilometer. One cannot overlook the fact that the jeep was inside the compound. It would not have travelled at a very excessive speed throughout. In that view of the matter, in absence of any clear-cut evidence in that regard, we think that the time lost before accused No. 2 set out for his return journey would be about 15 minutes. It would therefore be around 1 p.m. that accused No. 2 was about to set out for his return journey to his office. If the incident is stated to have occurred at 1 p.m., the presence of accused No. 2 at the scene of offence at the relevant time would certainly be a doubtful proposition.

13. In this connection it would be quite proper to look at the oral testimony of Prosecution Witness No. 3 at Ex. 11. According to him, at about 12.45 p.m. he had gone to the bus stand at Mogar on his motorcycle to drop his guest thereat. According to him, within five minutes therefrom practically immediately after dropping the guest at the bus stand, he returned to the factory. He has further deposed that, on his way back to the factory, accused No. 1 was standing in the verandah of his gate office, with information that the deceased had received a bullet injury. That should be around 12.50 p.m. If that be so, the presence of accused No. 2 at the scene of offence at the relevant time would be all the more doubtful in view of what is discussed hereinabove.

14. The witness at Ex. 11 has further stated that thereafter he went on his motorcycle to his office. At that time, according to the witness, another Senior Manager Mr. Kapoor was also there and accused No. 2 was on the lawns shouting at the witness that the watchman (the deceased) was hit by a bullet. This unequivocal statement of the witness at Ex. 11 would go to show that accused No. 2 was not present at the scene of offence at the relevant time. He was in the lawns of the administrative office of the company situated at about more than 1500 ft. from the main gate. It is needless to repeat or reiterate that the office of accused No. 2 as the Security Officer was near the main gate of the factory compound.

15. Learned Additional Public Prosecutor Shri Divetia is right that people would not be very serious about statements pertaining to time with exactitude. It is true that people in our country are by and large lethargic in their sense of time factor. It is however not in dispute that the company had its

recess time between 12.30 p.m. and 1 p.m. The witness at Ex. 11 was an officer in charge of the sales and excise department of the company. He was a retired military personnel. His sense of time can reasonably be presumed to be somewhat accurate. Coupled with the fact is that it was recess time. He is reported to have dropped his guest at the bus stand at Mogar a little after 12.30 p.m. This statement of his is indicative of the fact that he left his office to leave his guest at the bus stand soon on commencement of the recess at 12.30 p.m. The time sense of the cashier of the company at Ex. 9 also need not be doubted. He would be aware that he entered the factory compound during his recess time. In that view of the matter, the timings given by him would also be somewhat accurate with variation of hardly a minute or two. Taking into consideration all these factors appearing on the record of the case, we are of the opinion that the prosecution has not been able to establish beyond reasonable doubt the presence of accused No.2 at the scene of offence at the relevant time.

21.12.1995

16. It cannot be gainsaid, and the parties are not at dispute, that the muddamal pistol was in possession of accused No. 2 at the relevant time. It was a licenced fire-arm. Accused No.2 was working as the Security Officer of the company at the relevant time. He was therefore equipped with the fire-arm in question. It is again not in dispute that the deceased died of a bullet injury received from the muddamal pistol in possession of accused No. 2. The report of the ballistic expert at Ex. 29 is a clear pointer to the fact that the bullet found in the body of the deceased emanated from the muddamal pistol at the relevant time. The ballistic expert (Prosecution Witness No. 18) has again testified so in his oral testimony at Ex. 67.

17. It is true that the medical evidence in the form of oral testimony of Prosecution Witness No. 14 (Dr. Jagdishchandra Fakirbhai) at Ex. 72 suggests that the deceased died a homicidal death. The medical evidence in the form of the deposition at Ex. 72 rules out the possibility of both an accidental or a suicidal death. So is the case of an expert from the forensic science laboratory (Prosecution Witness No. 24 Dr. Ravindra Deshmukh) at Ex. 100. He has also clearly opined to the very same effect. Both in his report and in his deposition Dr. Deshmukh at Ex. 100 has clearly ruled out the possibility of the death of the deceased to be on account of an accident or a suicide. The learned trial Judge has accepted both the medical evidence and the forensic expert's evidence in that regard.

18. Both learned Advocates Shri Shethna and Shri Thakkar for

the respective accused have highlighted the case of an accidental death on the part of the deceased. According to both the learned Advocates, the deceased was a watchman and, on receipt of the holster containing the loaded pistol from accused No. 2, might have just tried to put the holster around his neck and might have taken out the pistol from its pouch and, while taking out the holster from his neck with the pistol in his left hand, his hand might have unwittingly pressed the trigger resulting into the shot piercing his right arm and entering in the abdomen just 4 inches above the navel. As against this, learned Additional Public Prosecutor Shri Divetia has submitted that no person, much less a watchman in the employment of a company, would like to play with a fire-arm.

19. Our attention has been invited to the oral testimony of Prosecution Witness No. 5 at Ex. 13. He was a paternal uncle of the deceased. In his police statement he is reported to have informed the investigating officer that his nephew died of an accidental shot emanating from the muddamal pistol in possession of accused No. 2 at the relevant time. It may be reiterated that, according to the prosecution story, on return from the bank in the company of the cashier after withdrawal of cash amount from the company's bank at Anand, at the office of the gate-supervisor, accused No.2 handed over his holster with a loaded pistol in its pouch to the deceased for its placement in the cupboard in the office of accused No. 2 working as the Security Officer of the company at the relevant time. As pointed out hereinabove, it was a licenced firm-arm. At the time of the incident, the muddamal pistol could be said to be in the custody of the deceased though it was in possession of accused No. 2. Relying on this admission on the part of the paternal uncle of the deceased by means of his police statement at the stage of initial investigation, both learned Advocates Shri Shethna and Shri Thakkar for the respective accused have submitted that the possibility of an accidental death of the deceased cannot altogether be ruled out.

20. Learned Additional Public Prosecutor Shri Divetia appears to be right in his submission that the so-called police statement of Prosecution Witness No. 5 at Ex. 13 was admittedly recorded by accused No. 3 at the relevant time. His investigation appears to be somewhat perfunctory. We shall deal with it little later. However, in view of the perfunctory nature of the investigation conducted by accused No. 3 at the relevant time, we would be disinclined to accept the submission urged before us by learned Advocates Shri Shethna and Shri Thakkar for the respective accused that it was a case of an accidental death and not a homicidal death. As pointed out hereinabove, the medical and the expert evidence on record are a clear pointer to the homicidal death of the deceased. With respect, the learned trial Judge has rightly accepted the

medical and the expert evidence on record for the purpose of coming to the conclusion that it was a case of homicidal death of the deceased and not that of an accidental death or a suicidal death. It may be clarified that neither learned Advocate for the accused has propounded at the time of hearing of this appeal the theory of a suicidal death on the part of the deceased.

21. That brings us to the conduct of the accused at the relevant time. The conduct that is highlighted is that of accused Nos. 1 and 2, more particularly accused No. 2, in removing the muddamal pistol from the scene of the incident at the relevant time. The scene of offence panchnama at Ex. 41 clearly shows that the muddamal pistol was lying in the cupboard in the office of the Security Officer, that is, accused No. 2 at that time. The scene of offence panchnama at Ex. 41 was drawn on the very same day between 4.30 p.m. and 5.30 p.m. The recovery panchnama of the muddamal pistol at Ex. 43 is not relevant for the present purpose for the simple reason that it was drawn on 5th April 1987, that is, nearly 6 years after occurrence of the incident. The fact however clearly emerges from the scene of offence panchnama at Ex. 41 on the record of the case that the muddamal pistol was removed from the scene of the incident. It cannot be gainsaid that, even if it was a case of an accidental death as a result of a shot from the muddamal pistol, the fire arm in question could not have been removed till the panchnama of the scene of the incident was drawn. As pointed out hereinabove, the scene of offence panchnama at Ex. 41 is a clear pointer to the fact that the muddamal pistol was removed from the place of the incident. It is needless to repeat that it was found from the cupboard in the office of the Security Officer of the company, that is, accused No. 2.

22. Learned Advocate Shri Shethna appearing for accused Nos. 1 and 2 has submitted that it was the duty of accused No. 2 as the Security Officer of the company to inform the police of the incident. Apropos, accused No. 2 went to the Rural Police Station at Anand to make a report of the incident and it was reduced to writing and it is at Ex. 36 on the record of the case. If accused No. 2 had gone to the police station for reporting the incident, he would not have allowed the muddamal pistol to remain at the place of the incident in that fashion. No prudent person, runs the submission of learned Advocate Shri Shethna for accused Nos. 1 and 2, would allow a fire-arm to remain in that condition when he goes out of the factory compound to report the incident to the police station about 8-10 Kilometers away therefrom. As against this, learned Additional Public Prosecutor Shri Divetia has submitted that, with a view to screening the crime, accused No. 2 went to the Rural Police Station at Anand for reporting the incident as an accident. In order to justify the act of removal of the pistol from the place

of the incident, runs the submission of Shri Divetia for the State, accused No.2 has made a false show by going to the Rural Police Station at Anand for reporting the incident to the police.

23. We think that, if it was a case of an accident, the conduct of accused No.2 was quite natural. He was under a duty to inform the police of the incident in question. It is not in dispute that he went to the police station and conveyed to the police the information of the incident. It was reduced to writing. It is at Ex. 36 on the record of the case. When accused No.2 left for the Rural Police Station at Anand for reporting the incident to the police, as a prudent person he was justified in placing the fire-arm in question in his cupboard in his office. That conduct on his part might be considered quite natural if it was the case of an accident. Since we concur with the finding of the learned trial Judge that it was a case of homicidal death, we will have to consider his conduct in the light of the prevalent circumstances.

24. As pointed out hereinabove, no eye witness was available to the prosecution for giving the ocular account of the incident in question. The prosecution has failed to establish the motive behind the crime. Prosecution Witness No. 3 at Ex. 11 has also clearly deposed that accused No. 1 at the relevant time informed of a sort of accidental injury from a bullet to the deceased. The exact words appear to have been used by accused No. 1 at the relevant time were "watchman ko goli laga". To the same effect were the words used by accused No.2 while shouting from the lawns in the company's compound near its administrative office as deposed to by Prosecution Witness No. 3 at Ex. 11. If that be so, the presence of accused No.2 at the scene of offence becomes quite doubtful. In that view of the matter, he can be said to have justifiably received the information of the incident as an accident and nothing more. In that context, we are of the opinion that his conduct of going to the Rural Police Station at Anand for reporting the incident to the police after placing the muddamal pistol in the cupboard in his office was quite natural in view of the prevalent circumstances. In any case, since this view is possible, we do not consider his said conduct, even if it is found unnatural in the context of the homicidal death of the deceased, to be a fully established incriminating circumstance on the record of the case.

25. A very severe and scathing criticism was levelled against the conduct of accused No. 3 in making a perfunctory investigation into the reported incident. In fact, learned Additional Public Prosecutor Shri Divetia has gone to the length of submitting that accused Nos. 1 and 2 acted on the advice of accused No. 3 at the relevant time. If we have to accept such

submission of the learned Additional Public Prosecutor, we have to believe that accused No.3 reached the factory compound, more particularly at the scene of the incident, soon after its occurrence. The incident is reported to have occurred around 12.55 p.m. on 25th August 1981. The entry in the Janva Jog Yadi at Ex. 37 clearly shows that the incident was reported at 1.45 p.m. The prosecution has brought on record the weekly diary of accused No.3 at Ex. 59 on the record of the case. In his weekly diary at Ex. 59, accused No.3 has recorded his presence in the Rural Police Station at Anand, from 8.15 a.m. to 11.40 a.m. He has further recorded therein that from 11.40 a.m. onwards he was engaged in investigation of the crimes registered as Crime Register No. 187/81. He has further recorded therein that he received information regarding the incident at 1.45 p.m. This prosecution evidence at Ex. 59 itself would rule out the presence of accused No. 3 at the place of the incident or at the scene of alleged offence soon after occurrence of the incident or prior to 1.45 p.m. Again, it has been further recorded in the weekly diary at Ex. 59 that accused No. 3 went to the company's factory first and, on learning therefrom that the injured victim was carried to hospital, accused No.3 went to the hospital. On reaching the hospital, it appears that, in the course of time, accused No. 3 learnt that the injured victim succumbed to his bullet injury at about 2.30 p.m. It appears that only thereafter he undertook investigation taking the case papers from Prosecution Witness No. 11 at Ex. 35. The witness at Ex. 35 has clearly stated that, after his return from the hospital on finding the injured victim to be under treatment and in coma, he handed over the investigation to accused No. 3. It therefore becomes clear that accused No. 3 did not appear on the scene of the incident before 1.45 p.m. and he could not have therefore advised or aided accused Nos. 1 and 2 or either of them in screening the crime, if any.

26. It is possible that accused No. 3 has not carried out the investigation in a proper manner. As rightly submitted by learned Additional Public Prosecutor Shri Divetia, accused No.3 ought to have taken accused No.2 to the task for removal of the muddamal pistol from the scene of the incident. However, it appears that accused No.3 recorded statements of certain witnesses including that of Himmatsingh Jalansingh (Prosecution Witness No. 5 at Ex. 13). As pointed out hereinabove, the witness at Ex. 13 was the paternal uncle of the deceased. He appears to have reported to accused No.3 that the deceased died of an accident on account of a shot being fired by him from the muddamal pistol. In that context and in view of the fact that there was no ocular account available from any corner or quarter in the factory compound, accused No.3 might have been justified in treating the case as that of an accidental death rather than a homicidal death. It would have been better and more advisable

and desirable on his part if he had attempted to send the pouch containing the pistol for examination of the finger prints found thereon. It would have been also better and more desirable on his part to have taken custody of the fire-arm itself and to have sent it to the forensic science laboratory for examination of finger prints found thereon. To that extent he can be said to have not properly conducted his task of investigation.

27. One fact at this stage may be noted. It has come in evidence that the building housing the office of the gate-supervisor and that of the Security Officer faces one hotel and a petrol pump on the other side of National Highway No. 8 running between Ahmedabad and Vadodara. It is not the prosecution case that the pistol was fitted with a silencer. A shot emanating from such pistol would give an explosive sound. It would be heard from a considerable distance. The incident has occurred at about 12.45 p.m. in a broad daylight in the month of August 1981. It is not the case of the prosecution or the defence that thundering clouds had gathered in the sky at the relevant time and the sound of the bullet was drowned in thunder. Since it was a broad daylight and since it is our common experience that National Highway No.8 is frequented by numerous vehicles during day time, both the petrol pump and the hotel might have quite a few customers thereat. The sound arising from the fire-arm shot could have been heard by people at the petrol pump and the hotel on the other side of the road. Even if customers present at that time might not have been available, it was advisable and desirable on the part of accused No.3 to have enquired of the manager or the owner of the hotel or the petrol pump about their or either of them having heard a fire-arm shot at about 12.45 p.m. That might have furnished some clue regarding the incident in the course of investigation undertaken by accused No.3 at the relevant time, more particularly when it clearly transpires from evidence on record that the man sitting in the office of the gate supervisor and the Security Officer can see the petrol pump and the hotel on the other side of National Highway No. 8. To that extent, accused No.3 can be said to have made dereliction in his duty in the course of investigation. However, we do not agree with learned Additional Public Prosecutor Shri Divetia in his submission to the effect that negligence in carrying out proper investigation or perfunctory investigation of the incident on the part of accused No.3 would amount to his complicity in the crime or that it was done with a view to screening the offenders in accused Nos. 1 and 2 or either of them. There is no material whatsoever on record to show or to suggest that accused No. 3 acted in league with accused Nos.1 and 2 or with either of them.

28. In view of our aforesaid discussion, we are of the opinion that the conduct on the part of accused Nos. 1 and 2,

more particularly of accused No. 2, at the relevant time in removing the muddamal pistol from the scene of the incident cannot be said to be absolutely unnatural. Similarly, the conduct of investigation on the part of accused No. 3 can at the most be said to be perfunctory or negligent but it cannot be branded as a make-believe type or can be said to be with a view to screening the offenders in accused Nos. 1 and 2 or either of them.

29. The remaining circumstances on record would show and suggest that the deceased died of a homicidal death. However, in absence of establishment of the unnatural conduct on the part of the accused at the relevant time, it would be difficult to fasten penal liability on the accused or any of them with respect to the incident in question. The other circumstances on record by themselves would not suggest beyond reasonable doubt that accused Nos. 1 and 2 or either of them was involved in the alleged crime of killing the deceased. The other circumstances on record might at the most suggest the homicidal death of the deceased. The question would however remain as to who did it. We do not agree with the learned trial Judge on that score that accused No. 1 did it. We do not agree with learned Additional Public Prosecutor Shri Divetia that accused No. 2 did it or that both accused Nos. 1 and 2 with their common object of doing away with the deceased did it. We do not agree with learned Public Prosecutor Shri Divetia that accused No. 3 has acted in such a manner so as to allow the crime to remain undetected.

30. In view of our aforesaid discussion, we are of the opinion that the impugned judgment and order of conviction and sentence cannot be upheld in law. It has to be quashed and set aside.

31. In the result, Criminal Appeals Nos. 415 and 416 of 1988 are accepted. The impugned judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Kheda at Nadiad on 13th April 1988 in Sessions Case No. 148 of 1987 is quashed and set aside. In that view of the matter, Criminal Appeals Nos. 716 and 717 of 1988 preferred by the prosecution fails. They are dismissed. We are told that accused No. 1 is in jail. He may be set at liberty if no longer required in any other case. Accused Nos. 2 and 3 are on bail. Their bail bonds are ordered to be cancelled. The fine if paid is ordered to be refunded. Muddamal articles Nos. 1 and 2 in the list at Ex. 1 are ordered to be returned to the person from whose custody they were seized. The remaining articles of muddamal may be disposed of in accordance with the directions given by the learned trial Judge in his impugned judgment and order.
